APR 23 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 890

THE LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioner,

versus

STATE MINERAL BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ROBERTS C. MILLING,
EUGENE D. SAUNDERS,
LAWRENCE K. BENSON,
HAYWOOD H. HILLYER, JR.,
JOSEPH B. MILLER,
Counsel for Petitioner,
1122 Whitney Building,
New Orleans, Louisiana.

SUBJECT INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTION AND STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING WRIT	7
CONCLUSION	19
APPENDIX	20

CITATIONS.

Cases:

Barnett v. State Mineral Board, 193 La. 1055, 192 So. 701 (1939) 9

Begnaud v. Grubb & Hawkins, 209 La. 826, 25 So. 2d 606 (1946) 9

Bell v. Hood, 327 U.S. 678 (1946) 15

Blackmar v. Guerre, 342 U.S. 512 (1952) 13, 18

Buckeye Cotton Oil Co. v. Amrhein, 168 La. 139, 121 So. 602 (1922) 19

Cobb v. La. Board of Institutions, ... La. ...., 85 So. 2d 10 9

Dept. of Highways v. Morse Bros. & Associates, Inc., 211 F. 2d 140 (5th Cir. 1954) 9

Ford Motor Co. v. Treasury Department of Indiana, 323 U.S. 459, 462 (1945) 12

CITATIONS—(Continued)

PAGE

Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 50 (1944) 12
Ickes v. Fox, 300 U.S. 82 (1937) 15
Land v. Dollar, 330 U.S. 731 (1947) 12, 15
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 12, 13, 14, 15
Louisiana Highway Commission v. Farnsworth, 74 F.2d 910 (5th Cir. 1935), cert. denied 294 U.S. 729 ..... 9, 11
Mente & Co. v. La. Rice Milling Co., 176 La. 476, 146 So. 28 (1933) 19
Miami Corp. v. State Mineral Board, 218 La. 163, 48 So. 2d 643 (1950) 9
Miami Corp. v. State Mineral Board, 122 F. Supp. 489 (W.D.La.1954) 10
Mioton v. Del Corral, 132 La. 730, 61 So. 772 (1913) 19
Northern P. R. Co. v. North Dakota ex rel Langer, 250 U.S. 135 (1919) 15
O'Brien v. State Mineral Board, 209 La. 266 24 So. 2d 470 (1945) 9
Realty Operators v. State Mineral Board, 202 La. 398, 12 So. 2d 198 (1942) 9
Saint v. Allen, 172 La. 350, 134 So. 246 8
Seibert v. Conservation Commission, 181 La. 237, 159 So. 375 (1935) 9
Sims v. State Mineral Board, 219 La. 342, 53 So. 2d 124 (1951) 9
Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549 (1922) 18
State v. Texas Co., 205 La. 417, 17 So. 2d 569 (1944) 9, 10

CITATIONS—(Continued)

PAGE

Texas Co. v. State Mineral Board, 216 La. 742, 44 So. 2d 841 (1949) 9
Tindal v. Wesley, 167 U.S. 204 15
Tyler v. Stanolind Oil & Gas Co., 77 F. 2d 802 (5th Cir. 1935), cert. denied 269 U.S. 627 .....12, 16, 17
United States Shipping Board Emergency Fleet Corp. v. Harwood, 281 U.S. 519 (1930) .. 18
West Coast Exploration Co. v. McKay, 213 F. 2d 582 (C.A.D.C.1954) 12, 15, 16
Wirth v. Albert, 174 La. 373, 141 So. 1 (1932) .. 19

Constitution and Statutes:
28 U.S.C. 1254 (1) 2
28 U.S.C. 1292 (1) 6
28 U.S.C. 1332 (a)(1) 3, 8, 12
Eleventh Amendment to the Constitution 3
Louisiana Revised Statutes of 1950, Title 30, Part II, Chapter 2, Sections 121 et seq. .. 3, 28

Miscellaneous:
Federal Rules Civ. Proc. 17 (b) 11

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No.

THE LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioner,

versus

STATE MINERAL BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Louisiana Land and Exploration Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, printed in the Appendix, infra p. 20, is reported in 229 F. 2d 5. The

opinions of the District Court are not officially reported, but are contained in the orders appealed from. (R. 107, 110.) They are printed in the Appendix, infra pp. 26, 27.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 27, 1956 (R. 134). A petition for rehearing, timely filed by petitioner (R. 135), was denied on February 28, 1956 (R. 169). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

I. Whether a federal district court has diversity jurisdiction when a Maryland corporation sues a Louisiana state leasing agency, which is a statutory "body corporate" possessing "all the usual powers incident to corporations" and "may sue and be sued," to restrain such incorporated agency from granting state mineral leases on property which the State itself conveyed into private ownership by patents and transfers and which the State has never questioned or attacked.

II. Whether a suit against such an incorporated state agency for specific relief to restrain it from granting mineral leases on petitioner's private property is in effect a suit against the State where, in so acting, such state agency was without any power, right or authority to grant the proposed leases and its actions were *ultra vires* its statutory powers.

CONSTITUTION AND STATUTES INVOLVED.

The constitutional and statutory provisions involved are the Eleventh Amendment to the Constitution and 28 U.S.C. 1332 (a)(1).

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

28 U.S.C. 1332 (a)(1) provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1) Citizens of different States; . . ."

Involved in the proper interpretation of these provisions is Louisiana Revised Statutes of 1950, Title 30, Chapter 2, Part II, Sections 121 et seq. creating the respondent State Mineral Board. It is printed in the Appendix, infra p. 28 et seq.

STATEMENT.

Invoking jurisdiction of the District Court because of diversity of citizenship (R. 2), petitioner, a Maryland corporation (herein sometimes called "plaintiff") brought this action against State Mineral Board, a public corpo-

ration of the State of Louisiana whose statutory powers are restricted to leasing state-owned lands and do not extend to lands which have passed into private ownership (infra p. 28), to restrain the Board from soliciting bids for and granting mineral leases on certain areas in Jefferson Parish, Louisiana, which plaintiff claims to own under a complete chain of title emanating from the State of Louisiana. (R. 2-14.) The courts below disposed of the case without evidence. (R. 122, 128-133.) Hence, the case presented below and here is that stated in the complaint.

The complaint alleged plaintiff to be the true and lawful owner of certain regular and fractional sections in Townships 17 and 18 South, Ranges 23 and 24 East, by mesne conveyances from the State of Louisiana emanating from State Patents 9018 and 9020 dated April 13, 1904 and transfers from the Lafourche Basin Levee District, a state subdivision, dated July 14, 1904 and October 18, 1904. (R. 2-6.) After deraigning plaintiff's title, it alleged that the State had never instituted a suit or proceeding to vacate or annul the patents and transfers and that under Louisiana Act 62 of 1912, as interpreted by the Supreme Court of Louisiana (Cf. *California Co. v. Price*, 225 La. 706, 74 So. 2d. 1; *Humble Oil & Refining Co. v. State Mineral Board*, 223 La. 47, 64 So. 2d. 839), neither the patents nor the transfers could now be attacked or called in question. (R. 6-7.) It further averred that the Board was casting clouds upon plaintiff's title and trespassing upon its rights by soliciting mineral lease bids on areas located inside the governmental subdivisions thus disposed of by the State and owned by plaintiff, but which the Board chose to describe in the lease solicitations as "All of the lands belonging to the

State of Louisiana, . . . within" certain designated areas only the outside perimeters of which were described, but which were so located as to include a part of plaintiff's property (R. 20-24, 77-82), "estimated to contain approximately" 612 acres in Tract 5906 and 1378 acres in Tract 5907. (R. 8-10.) Then followed allegations that the Board asserted the right to grant mineral leases upon plaintiff's property but that it was "without any power, right or authority" to do so and that the Board's attempt to lease Tracts 5906 and 5907 was "*ultra vires*, null and void insofar as" those tracts purported to cover or include any of plaintiff's described property. (R. 10.) After then alleging the lack of an adequate remedy at law and irreparable injury (R. 10-12), plaintiff prayed: (1) for a temporary restraining order pending application for a preliminary injunction, and on final hearing a permanent injunction "enjoining and restraining State Mineral Board . . . from asserting or purporting to assert any right to grant a mineral lease or leases on those portions of Tract 5906 and 5907 . . . insofar as said Tracts . . . purport to include any of the property" owned by plaintiff "and from taking any further steps looking to the granting of any such mineral lease or leases;" and (2) that the court adjudge and decree that the Board "was and is without any right, power or authority to attempt to include within said Tracts 5906 and 5907" any of plaintiff's property described in the complaint "for the purpose of attempting to grant any mineral leases thereon." (R. 12-13.)

The district judge granted a temporary restraining order. (R. 83-88.) Later, following a hearing of defend-

ant's motion to dissolve (R. 95-101), the district judge dissolved the restraining order on the ground that the District Court was without jurisdiction for the reason that the suit was in effect a suit against the State of Louisiana. (R. 107, infra p. 26.) Subsequently, the district judge refused plaintiff's application for a preliminary injunction on the same ground. (R. 110, infra p. 27.) Plaintiff appealed from these two interlocutory orders under 28 U.S.C. 1292 (1). (R. 111.)

The Court of Appeals, Fifth Circuit, affirmed, but remanded the case with directions to dismiss the suit for want of jurisdiction (R. 133), holding that (a) defendant Board is a mere agency or arm of the State and plaintiff's suit against the Board is in effect a suit against the State within the Eleventh Amendment to the Constitution; (b) the Eleventh Amendment also bars plaintiff's suit because the complaint is directed against the Board, not against its members individually; and (c) notwithstanding plaintiff's allegations that the Board's action was *"ultra vires"* and had cast "illegal clouds" upon plaintiff's title, the Board's lease solicitations were not without, but clearly within the Board's statutory power and, hence, any injunction against the Board would be compulsion against the State and is thus barred by the Eleventh Amendment. (R. 128-133.)

REASONS FOR GRANTING WRIT.

I.

INTRODUCTION.

The situation presented here is summarized as follows:

(a) A Louisiana political corporation, an entity separate from the State, proposed to grant to third persons the right to enter upon plaintiff's private property and extract oil and gas therefrom, under a pretension of statutory authority so to do.

(b) The State had long since conveyed such property to plaintiff's ancestors in title and itself could not attack such conveyance and, indeed, had never attempted to do so.

(c) The statute under which the agency purported to act did not (and constitutionally could not) confer authority on such agency to grant leases upon plaintiff's private property; hence the agency's actions were clearly *ultra vires* its authority.

(d) Plaintiff, a Maryland corporation, brought this action under general law for specific relief to prevent such unauthorized and *ultra vires* invasion of its rights by this separate entity. No relief is sought against the State. The jurisdictional amount is admittedly present.

As we shall show, under these circumstances, the requisite diversity of citizenship was present and the suit

was not "in effect" a suit against the State. The decision below to the contrary, besides being clearly erroneous, conflicts with applicable decisions of this Court, of the same and other federal courts of appeals, and of the highest court of the state; departs from the accepted course of judicial proceedings for determining such jurisdiction question; and erroneously restricts an important area of federal jurisdiction in a manner which will have far-reaching consequences upon the ability of non-residents to protect themselves in the federal courts against the unauthorized acts of state officers and agents.

II.

BOARD'S CORPORATE STATUS COMPLETES DIVERSITY JURISDICTION; MAKES ELEVENTH AMENDMENT INAPPLICABLE. ERRONEOUS CONTRARY HOLDING BELOW IGNORES IMPORTANT STATE AND FEDERAL DECISIONS.

For the reasons hereinafter set forth, it is believed that when a Maryland corporation sues a Louisiana agency such as State Mineral Board, which, according to the statute of its creation and state jurisprudence, is a "body corporate" possessing "all the usual powers incident to corporations" and "may sue and be sued", to restrain such incorporated agency from leasing private property, such a suit is one between citizens of different states, under 28 U.S.C. 1332 (a)(1) and is not a suit against a state under the Eleventh Amendment.

Continuously since *Saint v. Allen*, 172 La. 350, 134 So. 246, decided in 1931, Louisiana's highest court has made

a distinction between suits against incorporated state agencies and those against the State itself. The former are permitted and the latter prohibited. Under this rule, suits against the Board have been expressly sanctioned in *Texas Co. v. State Mineral Board,* 216 La. 742, 44 So. 2d 841 (1949) and *Begnaud v. Grubb & Hawkins,* 209 La. 826, 25 So. 2d 606 (1946). Indeed, as late as December 12, 1955, because of this distinction, the Louisiana Supreme Court reaffirmed the *Begnaud* case insofar as it held the Board to be subject to suit, but overruled it insofar as it sanctioned suits against the State itself. *Cobb v. La. Board of Institutions,* .... La. ...., 85 So. 2d 10 (1955). Cf. *State v. Texas Co.,* 205 La. 417, 17 So. 2d 569 (1944). The same rule has been repeatedly applied to the Board by necessary implication, in *Barnett v. State Mineral Board,* 193 La. 1055, 192 So. 701 (1939); *Realty Operators v. State Mineral Board,* 202 La. 398, 12 So. 2d 198 (1942); *O'Brien v. State Mineral Board,* 209 La. 266, 24 So. 2d 470 (1945); *Miami Corp. v. State Mineral Board,* 218 La. 163, 48 So. 2d 643 (1950); *Sims v. State Mineral Board,* 219 La. 342, 53 So. 2d 124 (1951). This distinction between an incorporated agency and the State itself prevails although issues of title are involved and the incorporated state agency purports to act on behalf of the State. *Seibert v. Conservation Commission,* 181 La. 237, 159 So. 375 (1935).

The Louisiana rule has been recognized and applied by the court below. *Louisiana Highway Commission v. Farnsworth,* 74 F. 2d 910 (5th Cir. 1935) cert. denied 294 U.S. 729; *Dept. of Highways of La. v. Morse Bros. & Assoc., Inc.,* 211 F. 2d 140 (5th Cir. 1954.) It has been

specifically applied to the Board in the lower federal courts in parallel cases. Cf. *Miami Corp. v. State Mineral Board,* 122 F. Supp. 489 (W.D.La. 1954.)

The court below admitted unequivocally that state law controls whether the Board is a distinct legal entity from the State. However, based upon an erroneous interpretation of *State v. Texas Co., supra,* and without citing any other state decisions relating to the Board, (although later and more directly in point) it held the Board was not separate from, but only an agency or arm of the State. In consequence, it ruled that this was not a suit between citizens of different states, but in effect a suit against the State prohibited by the Eleventh Amendment to the Constitution.

This holding, we submit, is in conflict with controlling state decisions on important questions of state law. Its error originates in an erroneous conception of the issue which was involved in the *State v. Texas Co.* case. The sole issue there was whether the State, by creating the Board, had granted the Board exclusive jurisdiction of suits to annul mineral leases and thereby had deprived itself of the right to maintain such an action. The state court decided that the State had not granted exclusive, but only concurrent jurisdiction to sue, and that the State could maintain its own action. Thus, contrary to the decision below, *State v. Texas Co., supra,* did not decide that the Board was not a distinct legal entity. All it held was that the State had retained the right to act independently of the Board. And even if *State v. Texas Co.* were susceptible of a different interpretation, as the court

below seemed to think, but with which we do not agree, it can not be regarded as the latest expression of state law and all the later decisions above cited disregarded.

It is believed, therefore, that the issue of federal jurisdiction is underlaid by important questions of state law. The court below has decided those questions contrary to a line of state decisions extending over 25 years. Its decision that this action is in effect a suit against the State is believed to be the exact opposite of what would have been decided had the same suit been filed in a state court. It is in clear conflict with Fed. Civ. Proc. Rule 17(b) which provides: "The capacity of a corporation to sue and be sued shall be determined by the law under which it was organized." Contrary to this rule, the decision below suggests that corporate status is not enough to establish capacity to sue and be sued; that the capacity of public corporations to be sued should be tested by one formula and private corporations by another. Lastly, in denying diversity jurisdiction, the court below has decided a federal question of substance by cutting off an entire segment of litigation long regarded as within the jurisdiction of federal courts because of the Fifth Circuit's own decision in the *Farnsworth* case, *supra*, (74 F. 2d 910), and the separate corporate status of the Board under Louisiana law.

III.

INCORPORATED STATE AGENCIES WHICH EXCEED STATUTORY POWERS ARE PROPER SUBJECTS OF DIVERSITY JURISDICTION. ERRONEOUS CONTRARY HOLDING BELOW CONFLICTS WITH IMPORTANT FEDERAL QUESTIONS CONTRARY TO DECISIONS OF THIS COURT, OF OTHER CIRCUITS, OF THE COURT BELOW AND WITH ELEMENTARY PRINCIPLES OF STATE LAW.

In addition to what had been said, it is believed that the District Court had diversity jurisdiction of this action under 28 U.S.C. 1332 (a)(1) because this is a suit under general law by a Maryland corporation against a Louisiana public corporation for specific relief, to enjoin the defendant Board from acting *ultra vires* and without power in attempting to grant leases for the extraction of oil and gas from plaintiff's property. Cf. *Ford Motor Co. v. Treasury Dept. of Indiana*, 323 U.S. 459, 462 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 50 (1944).

The holding of the Court of Appeals to the contrary is believed to be in conflict (a) in principle, with *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) and other decisions of this Court, such as *Land v. Dollar*, 330 U.S. 731 (1947); (b) with the *in banc* decision of the Court of Appeals for the District of Columbia on the same matter, in *West Coast Exploration Co. v. McKay*, 213 F. 2d 582 (1954), cert. denied 347 U.S. 989; (c) with the Fifth Circuit's own decision in *Tyler v. Stanolind Oil & Gas Co.*, 77 F. 2d 802 (5th Cir. 1935),

cert. denied 296 U.S. 627; (d) in principle, with *Blackmar v. Guerre*, 342 U.S. 512 (1952), wherein this Court reversed the court below in a converse situation; and (e) with important fundamental questions of state law, contrary to applicable state decisions. The total effect of the decision below is that an important question of federal jurisdiction has been decided in a way which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The scope of the conflict with the cited cases and the errors in the decision below may be stated briefly as follows:

(a) The Conflict in Principle with *Larson v. Domestic and foreign Commerce Corp.*, 337 U. S. 682, and Related Cases.

The structural essence of the complaint is that plaintiff, as the owner of the regular and fractional sections involved, has full dominion over them, and that the Board, by asserting that state-owned lands available for leasing exist within these areas previously patented by the State to plaintiff's ancestors in title, exceeded its statutory authority. It is believed that these averments were sufficient to establish the case at bar to be an exception to the general rule that suits against public officers are suits against the sovereign. It is also believed that the allegations in the instant complaint invoked the exception recognized in the *Larson* case (p. 689) that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions . . . His actions are *ultra vires*

his authority and therefore may be made the object of specific relief . . ." This is not a case which merely alleges erroneous or tortious action within the Board's statutory power. It is, rather, a suit which charges action by the Board in excess of its statutory power. In consequence, it is, as this Court recognized in the *Larson* case, not a suit against the sovereign. The Court of Appeals, reaching the contrary result, ascribed no legal effect to the Board's avowed purpose to lease several hundred acres of land within the properties patented to plaintiff's ancestors. It held in effect that as long as the Board described the area to be leased as "all lands owned by the State," the Board could not exceed its statutory power. And this decision was reached notwithstanding that for all practical purposes the Board in its motion to dissolve the restraining order (R. 97) admitted it intended to lease that part of plaintiff's property known as "Turtle Bay." In other words, the ruling below is that although the Board asserted the right to lease several hundred acres of plaintiff's property, it did not and could not exceed its statutory power simply because the Board chose to describe the area to be leased as land belonging to the State. This anomalous decision was reached, as we have seen (R. 122), without receiving any evidence and even without any answer being filed by the Board. The court below cited the *Larson* case to support its ruling. However, it is believed that the rationale of the *Larson* case does not support the ruling, but actually condemns it. For this Court was very careful in the *Larson* case to point out the distinction between mere erroneous or tortious action within statutory power, which was all the *Larson* case involved, and acts in excess of statutory power such

as we are concerned with in the case at bar. On this precise basis, the decision below is also in conflict with cases such as *Land v. Dollar*, 330 U.S. 731, and *Tindal v. Wesley*, 167 U.S. 204, cited with approval in the *Larson* case.

(b) The Conflict with the Court of Appeals, District of Columbia, in *West Coast Exploration Co. v. McKay*, 213 F. 2d 582, cert. denied 347 U.S. 989.

The foregoing discussion points up a basic conflict between the opinion of the court below and the decision of the Court of Appeals for the District of Columbia, in *West Coast Exploration Co. v. McKay, supra.* In the case at bar, neither the district judge nor the appellate court held, or even inferred, the allegations of the complaint to be unsubstantial or frivolous. Had there been such a finding, a judgment of dismissal without a hearing on the merits would have been proper. *Land v. Dollar, supra; Bell v. Hood*, 327 U.S. 678 (1946); *Northern P. R. Co. v. North Dakota ex rel Langer*, 250 U.S. 135 (1919). Without such a finding, however, neither the district judge nor the appellate court were justified in assuming that plaintiff would not be able to prove its case and would not be able to show that the Board had exceeded its statutory authority in attempting to lease plaintiff's property. *Ickes v. Fox*, 300 U.S. 82 (1937). Thus, it is evident that in the case at bar neither the trial judge nor the appellate court realized that the proper procedure in cases of this character, as announced in the *West Coast Exploration Co.* case and amply implemented by the decisions of this Court, is that for jurisdictional purposes the court is

obliged to make a preliminary decision on the ultimate question in the suit. If the averments of the complaint are not unsubstantial or frivolous, they are accepted at face value for jurisdictional purposes. This affords the plaintiff a hearing and an opportunity to prove his case. The preliminary jurisdictional decision does not, however, control the ultimate decision on the merits. Only if it appears after trial that the administrative officer or agency has not exceeded his or its statutory power is the suit dismissed for want of jurisdiction. It is believed that this judicial process announced by the Court of Appeals for the District of Columbia in the *West Coast Exploration Co.* case, is correct. It is also submitted that when the court below treated this as a suit against the State in advance of hearing evidence and without finding the allegations of the complaint to be frivolous, it rendered an erroneous decision on an important question of federal jurisdiction, which conflicts with the decision on the same subject matter by the Court of Appeals for the District of Columbia in the *West Coast Exploration Co.* case. As a result, plaintiff's suit has been dismissed for want of jurisdiction and plaintiff denied a hearing without being afforded an opportunity to prove that jurisdiction actually existed.

(c) The Conflict With the Court's Own Holding in *Tyler v. Stanolind Oil & Gas Co.*, 77 F. 2d 802, cert. denied 296 U.S. 627.

Nor was the trial court or the court below ever in a position to hold the averments of the complaint to be unsubstantial or frivolous. In *Tyler v. Stanolind Oil &*

Gas Co., supra, in which this Court denied certiorari, the court below, itself, enjoined public officials of Texas from granting a patent on an alleged "vacancy" within a tract of land previously patented to the ancestor in title of the plaintiff in that case. Its holding was that "serious questions of law and fact are presented which may be decided only after full hearing on the merits." In the *Tyler* case the court below decided that the action was not against the State, was not prohibited by the Eleventh Amendment and that the State was not a necessary party. No valid distinction exists between an attempt by public officials of Texas to patent an alleged state-owned vacancy within a tract of land previously patented by the State, and an attempt by the respondent Board to grant a mineral lease on an area which it asserts is state-owned but which has been previously patented by the State to this plaintiff's ancestor in title. Although the two cases by the same court involve the identical legal questions and reach diametrically opposite conclusions, the *Tyler* case was not even cited, much less discussed, by the court below. Aside from the parties and issues here involved, these important questions are presented: What yardstick will litigants in the Fifth Circuit use to determine federal jurisdiction? The *Tyler* case, in which this Court denied certiorari? Or the decision below which neither affirms, distinguishes nor overrules the *Tyler* case? Beyond any doubt, the decision below reopens questions of federal jurisdiction which have been long regarded as settled law.

(d) The Conflict in Principle, with *Blackmar v. Guerre*, 342 U.S. 512.

The court below also stated that this was a suit against the State because the complaint was directed against the Board and not against its members individually. This, we submit, is manifestly in conflict with the principles laid down in *Blackmar v. Guerre, supra,* which also arose from the court below. In the *Blackmar* case, this Court held the individual members of the Civil Service Commission to be suable for acts of the Commission only because it "is not a corporate entity which Congress has authorized to be sued, . ." Thus, by necessary implication, the *Blackmar* case contradicts the ruling below that the members of an incorporated state agency should have been sued as individuals for the wrongful and *ultra vires* acts of such agency even though it is a "body corporate" possessing the power to "sue and be sued" and has "all the usual powers incident to corporations." Cf. *United States Shipping Board Merchant Fleet Corp. v. Harwood,* 281 U.S. 519 (1930); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.,* 258 U.S. 549 (1922). The mere statement of the conflict demonstrates, we submit, the novel, albeit erroneous, method of determining federal jurisdiction by the court below.

(e) The Conflict with Important Fundamental Principles of Louisiana Law.

The holding that the individual members of the Board should have been sued for the *ultra vires* acts of that incorporated agency also conflicts with settled rules of

local corporation law. It is elementary in Louisiana that a body corporate is a distinct entity from those who compose it. *Mente & Co. v. La. State Rice Milling Co.*, 176 La. 476, 146 So. 28 (1933); *Buckeye Cotton Oil Co. v. Amrhein*, 168 La. 139, 121 So. 602 (1929); *Mioton v. Del Corral*, 132 La. 730, 61 So. 771 (1913). And, ordinarily, individual members of a corporation are not responsible to third persons. *Wirth v. Albert*, 174 La. 373, 141 So. 1 (1932). It is, therefore, believed that, independently of all other grounds, the ruling of the court below that the individual members of the Board should have been sued because the Board exceeded its statutory powers, so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

April 19, 1956.

ROBERTS C. MILLING,
EUGENE D. SAUNDERS,
LAWRENCE K. BENSON,
HAYWOOD H. HILLYER, JR.,
JOSEPH B. MILLER,
Counsel for Petitioner.

APPENDIX.

OPINION OF COURT OF APPEALS.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15531.

THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellant,

versus

STATE MINERAL BOARD,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 27, 1956.)

Before BORAH and JONES, Circuit Judges, and DAWKINS, Sr., District Judge.

BORAH, Circuit Judge: The question here is one of jurisdiction. Invoking the jurisdiction of the District Court, on the ground of diversity of citizenship, The Louisiana Land and Exploration Company, a Maryland

corporation, instituted this action against the Louisiana State Mineral Board, a public corporation,[1] seeking to restrain the Board from soliciting bids for or from granting a mineral lease or leases on certain lands, including the beds of certain water bodies, located in Jefferson Parish, Louisiana, which lie within the confines of twenty-six regular and fractional sections in Township 17 and 18 South, Ranges 23 and 24 East.[2]

The complaint alleges that plaintiff is the true and lawful owner of the area within these sections by title emanating from State Patents Nos. 9018 and 9020, dated April 13, 1904, and by virtue of two transfers from the Lafourche Basin Levee District, dated July 14, 1904, and October 13, 1904, respectively. It then sets forth plaintiff's chain of title, and alleges that the State has never instituted a suit or proceeding to vacate or annul the said patents and transfers and that Act 62 of 1912 bars any such proceedings. The text of the Board's description of the lands in Tracts 5906 and 5907, which are here involved, and on which it is alleged to have requested bids for mineral leases is next set forth. The description reads, in part: "All of the lands owned by the State of Louisiana, including, but not limited to, the beds and bottoms of all of the water bodies and streams. . . . and all islands and other lands formed by accretion or reliction (less and except tax lands and lands and water bottoms under oil, gas and mineral lease from the State . . .)," situated in Townships 17 and 18 South, Ranges 23 and 24 East.

---

1 La. Revised Statutes of 1950, 30:121 *et seq.*

2 From the exhibits attached to the complaint, it is apparent that the designated sections contain considerably more than 10,000 acres.

The two tracts are described by metes and bounds and the portions claimed to be State-owned are estimated to be 612 and 1378 acres, respectively. The complaint then sets forth that the defendant's action in advertising the two tracts for lease is ultra vires, null and void, casts illegal clouds upon plaintiff's title, constitutes a trespass upon plaintiff's rights, and a disturbance of plaintiff's possession. And then, following allegations of the lack of an adequate remedy at law and the necessity for injunctive relief to prevent irreparable injury, plaintiff prays: (1) for a temporary restraining order pending application for a preliminary injunction, and on final hearing a permanent injunction "enjoining and restraining defendant, State Mineral Board, its officers, agents, servants, employees, attorneys and other representatives from asserting or purporting to assert any right to grant a mineral lease or leases on those portions of Tracts 5906 and 5907 . . . insofar as said Tracts . . . purport to include any of the property" alleged to be owned by plaintiff, "and from taking any further steps looking to the granting of any such mineral lease or leases;" and (2) that the court "adjudge and decree that defendant was and is without any right, power or authority to attempt to include within said Tracts 5906 and 5907" any of the property described in the complaint as being owned by plaintiff, "for the purpose of attempting to grant any mineral leases thereon."

Upon the filing of the verified complaint, the district judge granted a temporary restraining order and thereafter, and following a hearing, he sustained defendant's motion to dissolve the temporary restraining order on the ground that the District Court was without jurisdiction

for the reason that the suit was in effect a suit against the State of Louisiana, citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682. Thereafter, the case came on for hearing on plaintiff's application for a preliminary injunction and defendant's opposition thereto, and the court being of the opinion that it was without jurisdiction entered an order refusing to grant the preliminary injunction for the same reasons which it gave in its prior order dissolving the restraining order. It is from these two orders of the District Court that the plaintiff has appealed.

The narrow question presented on this appeal is whether the within action is, in effect, a suit against the State. Appellant contends that this question must be answered in the negative. First, it is argued that the State Mineral Board is a separate and distinct corporate entity, possessing all of the usual powers incident to corporations, and that this was sufficient to vest the District Court with jurisdiction based upon diversity of citizenship. Whether or not appellant is right in this contention must be determined by the law of the State. In *La. Highway Comm. v. Farnsworth*, 5 Cir., 74 F. 2d 910, and in *Dept. of Highways of La. v. Morse Bros. and Associates, Inc.*, 5 Cir., 211 F. 2d 140, this court had occasion to consider a like question, and our decisions in both cases were of necessity predicated upon the clear and unmistakable pronouncement of the Louisiana Supreme Court in *Saint v. Allen*, 172 La. 350, 134 So. 246, that the Louisiana Highway Commission was a "distinct legal entity separate from the state." Appellant relies heavily upon *Saint v. Allen, supra*, but this decision is not apposite here and cannot be applied to the State Mineral Board for the rea-

sons which the Louisiana Supreme Court pointed out in *State v. Texas Co.*, 206 La. 417, 17 So. 2d 569. There, it likened the State Mineral Board to an agent of an independent property owner who had been granted full, but not exclusive, authority in the management and supervision of the owner's holdings. Thus, the fact that the legislature chose to call it a corporation does not alter the Board's characteristics so as to make it something other than what it actually is, a mere agent of the State. Accordingly, it is clear that when the Board sues or is sued, it appears in court as an agent of its principal, the State. We, therefore, are of the opinion that this suit against the State Mineral Board, a mere agency or arm of the State, is in effect, a suit against the State which may not be sued by a citizen of another state under the Eleventh Amendment to the Constitution of the United States. Cf. *State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U. S. 194.

This brings us to a consideration of appellant's second point which is that the Eleventh Amendment is inapplicable and does not bar the present suit against a State agency which wrongfully has exceeded its statutory authority. This contention is likewise without merit for the reason that the complaint is directed against the State Mineral Board in its official capacity, not against its members individually, and because the acts complained of are not without, but clearly within the Board's statutory power. It is true that the complaint did allege that the Board's action was "ultra vires" and cast "illegal" clouds upon plaintiff's title, but these allegations were not and could not be based upon any lack of statutory power on the part of the Board to advertise, as it was

alleged to have done, for lease bids upon "all lands owned by the State." The *Larson* case makes it clear that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law. This does not mean, as we pointed out in the *Larson* decision, that a government officer is thereby necessarily immunized from liability, if his action is such that liability would be imposed by the general law of torts, but only that in this situation the action itself cannot be enjoined, since it is also the action of the sovereign. It is therefore plain that the State Mineral Board cannot be enjoined in this suit since the compulsion which the court is asked to impose would be compulsion against the sovereign; and for that reason the suit is barred by the Eleventh Amendment, not because it is a suit against the Board, but because it is, in effect a suit against the State.

In the light of the foregoing we hold that the district judge was right for the reasons which he gave in dissolving the restraining order and in concluding that a preliminary injunction should not issue. Accordingly, the orders appealed from are affirmed and the cause is remanded to the District Court with directions to dismiss the suit for want of jurisdiction.

OPINION AND ORDER OF DISTRICT COURT DISSOLVING RESTRAINING ORDER.

ORDER GRANTING THE DISSOLVING OF THE TEMPORARY RESTRAINING ORDER.

Minute Entry February 4, 1955 Christenberry, J:

(Number and title omitted)

The motion to dissolve the temporary restraining order on the ground that this Court is without jurisdiction for the reason that the suit is in effect a suit against the State of Louisiana, is GRANTED, and the temporary restraining order is dissolved. *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 70 S. Ct. 31.

The right of the State Mineral Board to establish and recover the damages sustained by it and/or the State of Louisiana because of the issuance of said temporary restraining order is reserved.

H. W. C. ENT'D FEB 7 1955

OPINION AND ORDER OF DISTRICT COURT REFUSING PRELIMINARY INJUNCTION.

JUDGMENT OR ORDER REFUSING PRELIMINARY INJUNCTION.

(Number and title omitted)

(Filed: February 11, 1955)

This cause came on to be heard on application of the plaintiff, The Louisiana Land and Exploration Company, for a preliminary injunction, and the Court having heretofore dissolved the temporary restraining order issued herein, on the ground that this Court is without jurisdiction for the reason that the suit is in effect a suit against the State, and the defendant having moved that plaintiff's application for a preliminary injunction be denied, and the Court being of the opinion that plaintiff's application for a preliminary injunction should be refused on the ground that this Court is without jurisdiction for the reason that the suit is in effect a suit against the State;

IT IS ORDERED, ADJUDGED AND DECREED that the application of plaintiff, The Louisiana Land and Exploration Company, for a preliminary injunction herein against the defendant, State Mineral Board, be and the same is hereby refused.

Form settled and approved and the Clerk is hereby directed to enter this judgment forthwith.

February 11, 1955.

s/ Herbert W. Christenberry
United States District Judge

ENT'D FEB 11 1955

LOUISIANA REVISED STATUTES OF 1950, TITLE 30, CHAPTER 2, PART II, SECTIONS 121 ET SEQ.

§ 121. State Mineral Board created; composition and powers

The State Mineral Board shall be composed of the Governor and twelve members to be appointed by him. The Governor shall be ex-officio chairman. The board shall be a body corporate, with its domicile at the State Capitol, may sue and be sued, and shall possess in addition to the powers herein granted, all the usual powers incident to corporations. Seven members shall constitute a quorum. In case of a tie on any vote, the vote of the Governor shall determine the issue. As amended Acts 1950, No. 59, § 1.

§ 122. Compensation

The appointed members shall receive no salaries, or expenses, but shall receive fifty dollars for each day or part thereof of actual sessions. As amended Acts 1950, No. 51, § 1.

§ 123. Meetings

The board shall meet at the call of the governor and may meet at places other than its domicile.

§ 124. Board may lease public lands

The State Mineral Board has authority to lease for the development and production of minerals, oil, and gas, any lands belonging to the state, or the title to which is in the public, including road beds, water bottoms, and lands adjudicated to the state at tax sale.

§ 125. Application for lease; deposit

When a person desires to lease state lands, he shall make application to the board in writing, giving the description of the land and enclosing a certified check for one hundred dollars as evidence of good faith. This sum shall be returned if he should bid for the lease. As amended Acts 1954, No. 671, § 1.

§ 126. Inspection; quantity of land; advertisements for bids

Upon receipt of an application accompanied by deposit, the board may cause an inspection of the land to be made, including geophysical and geological surveys. After receiving the report of the inspection, the board may offer for lease all or part of the lands described in the application. However, no lease shall contain more than five thousand acres. The board shall require the Register of the State Land Office to publish in the official journal of the state, and in the official journal of the parish where the lands are located, an advertisement for a period of not less than fifteen days. This advertisement shall contain a description of the land proposed to be leased, the time when bids will be received, any other information that the board may consider necessary, and the royalty to be demanded should the board deem it to the interest of the state to call for bids on the basis of a royalty fixed by it. If the lands are situated in two or more parishes, advertisement shall appear in the official journals of all the parishes where the lands may be partly located. These advertisements need not appear oftener than once a week.

The board may also cause notices to be sent to those whom it thinks would be interested in submitting bids. The board may on its own motion and without application require the Register of the State Land Office to advertise for bids for a lease in the same manner as if an application had been made. As amended Acts 1950, No. 388, § 1.

§ 127. Opening bids; minimum royalties; terms of lease

Bids may be for the whole or any particularly described portion of the land advertised. At the time mentioned in the advertisement for the consideration of bids, they shall be publicly opened. Bids received by the mineral board shall be opened at the state capitol. The mineral board has authority to accept the bid most advantageous to the state, and may lease upon whatever terms it considers proper. However, the minimum royalties to be stipulated in any lease shall be:

(1) One eighth of all oil and gas produced and saved.

(2) Seventy five cents per long ton of sulphur produced and saved.

(3) Ten cents per ton of potash produced and saved.

(4) One eighth of all other minerals produced and saved.

The board may reject any and all bids, or may lease a lesser quantity of property than advertised and withdraw the rest. However, no lease of a lesser quantity than advertised shall be granted for any less proportionate

bonus and delay rental than the lesser quantity bears to the total area advertised or embraced in the most favorable bid submitted.

If all written bids are rejected, the board may immediately offer for competitive bidding a lease upon all or any designated part of the land advertised, upon terms appearing most advantageous to the state. This offering shall be subject to the board's right to reject any and all bids. No lease shall be for more than five thousand acres and none shall be for less bonus or delay rental than was offered in the most favorable written bid for the same property. Where a lease provides for delay rental, the annual rental shall not be for less than one half the cash bonus. All lands shall be accurately described in a lease:

§ 128. Transfers, approval by board

No transfer or assignment in relation to any lease shall be valid unless approved by the State Mineral Board.

§ 129. Powers and duties of board; pooling agreements; operating units

The board shall have full supervision of all mineral leases granted by the state, in order that it may determine that the terms of these leases are fully complied with, and it has general authority to take any action for the protection of the interests of the state. It may institute actions to annul a lease upon any legal ground. The board has authority to enter into agreements or to amend a lease. However, the board shall not extend the primary term of any lease except as hereinafter provided. In the event the board should determine in its discretion that any

lease granted prior to the effective date hereof covers and affects in whole or in part lands lying in offshore areas, then the board may in its further discretion extend the primary term of such lease for a period not to exceed two years, with rentals for the extended term to be paid at the rate specified in such lease. Further, the board shall not, except as to unitization and pooling agreements, amend a lease by reducing the amount of bonus, rental, royalty, or other consideration stipulated in the lease. It may join in pooling and unitization covering a lease, the mineral and royalty rights thereunder and any other lease, mineral or royalty rights in and under any other property, so as to create, by the combination of these leases, or royalty and mineral rights, one or more operating units, as hereinafter defined. The board may agree in the event of production of minerals from any unit so created, that the lessor shall receive and accept on account of production, whether or not production is from any part of the property covered by the lease, a royalty proportionate to that part of the production or proceeds which the lessor is fairly entitled to receive. In determining this proportionate part the board may consider the surface acreage, the estimated original reserves in place, the estimated ultimate recovery, sand thickness, porosity, permeability, as determined by approved engineering practices, and any other relevant factors. This portion of the royalty shall be paid in the same manner, and subject to the same conditions, as other royalties agreed to be paid under the lease, but shall be in lieu of all other royalties which would accrue under the lease on account of production from any part of the property covered by the lease included in the unit. "Operating unit," as herein

used means that number of surface acres of land which, under regular or special rules of the commissioner of conservation or other authority having control in the premises, or by agreement of the lessors, lessees and mineral and royalty owners, may be pooled and unitized for development and operation as a unit. An agreement creating an operating unit may provide for cycling, recycling or pressure maintenance or repressuring in fields productive of oil, gas and gas from which condensate, distillate or other product may be separated or extracted. The commencement of operations for the drilling of a well, or production of minerals on any portion of a unit in which all or any part of the property covered by the lease is embraced shall have the same effect, under the terms of the lease as if it had occurred on the lands embraced by the lease. As Amended Acts 1950, No. 46, § 1.

§ 130. Register of State Land Office, powers and duties

The Register of the State Land Office shall keep the records, including all bids, proposals, assignments or transfers, pertaining to leases and shall furnish the board such data, information, reports, descriptions, records, certified copies, and the like as the board may require.

The Register of the State Land Office is authorized to sign for the state, all division orders or other documents which are necessary or customary, with respect to the production and sale of oil by lessors and royalty owners after these documents have been inspected and approved by the state mineral board or by anyone invested with authority by the board. As amended Acts 1950, No. 290, § 1.

§ 131. Surveys, reports and investigations

The Department of Public Works, parish surveyors, State Highway Engineers, Louisiana State University and Agricultural and Mechanical College and any board, department or institution of the state and the governing authorities of political subdivisions shall make such surveys, reports, and investigations, and furnish such records and information as may be required by the State Mineral Board for the purpose of determining boundaries, character, title, location and other matters relating to lands.

§ 132. Attorney for board

The Attorney General shall be the attorney for the board, but the board shall have authority to employ additional counsel and fix and pay the compensation for such counsel, subject, however, to the authority of the Attorney General to approve such counsel and his authority to issue, under his power of appointment of assistants, a commission to such counsel as assistant attorney general. As Amended Acts 1952, No. 384, § 1.

§ 133. Excess over minimum royalties, dedication of (Repealed by Act 491 of 1952).

§ 134. Roads, etc.; payment to parishes; compromise of claims

The provisions of this Sub-part shall extend to the public roads, canals, and similar properties, the title to which is in either the state or the parishes. Where road beds belonging to the parishes are leased by the board, the leases shall provide for the payment of a royalty to the

parish in which production occurs of a least one-sixteenth of the minerals produced, to be used by the police jury for public purposes. The governor, the Attorney General and the executive counsel or any two of them, may settle and compromise with the parishes or other claimants, all matters relating to lands or rights referred to in this Section, upon terms and conditions any two of them decide. In connection with agreements these officers, or any two of them, may stipulate for the reconveyance of lands to the state and for payment of royalties and rentals and the division thereof between the state and the parishes or other claimants.

§ 135. Secretary and other employees

The board shall employ a secretary and necessary clerical and field forces. As Amended Acts 1950, No. 291, § 1.

§ 136. Funds, disposition of

All funds belonging to the state under the terms of valid existing mineral leases entered into under this Subpart shall be collected by and paid to the Register of the State Land Office and shall be deposited by that officer in the state treasury to the credit of the general fund. The Register of the State Land Office is empowered and authorized to deduct the sum of ten thousand dollars from the first lease bonuses or rentals received after the effective date of this section and thereafter to deduct such amounts from lease bonuses or rentals as will maintain the said fund at ten thousand dollars. The Register of the State Land Office is authorized and empowered to use this fund to pay any expenses incurred under R.S. 30:126

for advertising any state-owned lands. However, ten per cent of the minimum royalties received from the proceeds of leases on state-owned lands shall be placed by the State Treasurer in a special fund to the credit of the parish in which production occurred. This fund shall be referred to as the "Road Fund". The money in this road fund shall be subject to withdrawal by the State Department of Highways and shall be used exclusively by it for the construction of black top, concrete, or other hard-surface roads in the parish where production occurs, and for the operation and maintenance of automobile ferries in that parish. As Amended Acts 1954, No. 17, § 1.